UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 06-11895-RWZ

JOHN N. SIMONS, JR., *et al.*

v.

HITACHI AMERICA, LTD., *et al.*

MEMORANDUM OF DECISION AND ORDER

May 3, 2007

ZOBEL, D.J.

I. Introduction

Plaintiffs filed this action in state court against Hitachi America, Ltd., a New York corporation ("Hitachi"), and Simon's Furniture, a Massachusetts corporation ("Simon & Sons"). They claim damages for personal injuries and death allegedly caused by a defective television set manufactured by Hitachi and sold by Simon & Sons. Hitachi removed the case to federal court, claiming that the joinder of Simon & Sons was fraudulent. The matter is before this court on plaintiffs' motion to remand. For the reasons discussed below, the motion is allowed.

II. Procedural and Factual Background

A. Procedural History

On the evening of May 13, 2005, a fire destroyed the Simons' family home in Franklin, Massachusetts, and caused the deaths of three members of the Simons family, John and Joan Simons, and their daughter Debra Monahan. Plaintiffs,

decedents' executor and administrator along with Debra Monahan's son, James, filed suit in Massachusetts state court on November 28, 2005. Plaintiffs allege that a model CT1900A television manufactured by Hitachi and sold by Simon & Sons caused the fire.[1] The initial complaint sought damages against both defendants on multiple theories relating to the sale of a defective product. Plaintiffs filed a second amended complaint on August 17, 2006, which corrected the second defendant's name to "A. Simon & Sons, Inc. D/B/A Simon's Furniture, Inc.," and added two more defendants - Hitachi Home Electronics (America), Inc., a California corporation, and Hitachi, Ltd., a Japanese corporation (collectively included with Hitachi America, Ltd. as "Hitachi"). Based on the allegations in both the original and the amended complaints, the case was not removable because the inclusion of defendant Simon & Sons, a Massachusetts corporation, defeated the complete diversity of citizenship required by 28 U.S.C. § 1332.[2]

On September 19, 2006, Hitachi received a copy of Simon & Sons' motion for summary judgment. In support of its motion, Simon & Sons argued that, based on plaintiffs' responses to its interrogatories and its own affidavits, there was no evidence it ever sold a television to decedents, and therefore it was entitled to summary

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[1] The case was originally brought in Suffolk Superior Court, but was transferred by that court to Norfolk Superior Court on October 2, 2006, in response to a motion by Hitachi America, Ltd. to dismiss the complaint on the ground of improper venue. (See Dkt. No. 23, Ex. 1.)

[2] It is well settled that diversity must be complete, that is, no defendant may share citizenship with any plaintiff. See, e.g., Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth., 207 F.3d 21, 27 (1st Cir. 2000).

judgment. (Dkt. No. 23, Ex. 4.) Less than 30 days later, on October 17, 2006, Hitachi removed the case to federal court under 28 U.S.C. § 1441(a), asserting that diversity jurisdiction existed because Simon & Sons was fraudulently joined to the Simons action. (See Dkt. No. 1, 5-8.) Plaintiffs filed a motion to remand four days later. (Dkt. No. 3.) On November 8, 2006, I ordered the parties to file any argument on the court's jurisdiction in the case by December 15, 2006 (later extended to February 2, 2007, see Dkt. No. 22) and allowed limited discovery directed to that issue. (Dkt. No. 12.) Both parties have filed memoranda in support of their respective positions. (Dkt. Nos. 23, 24.)

B. Factual Background

Both the original complaint and the second amended complaint allege that the fire was caused by a Hitachi "color televison (Model CT1900A)" sold by Simon & Sons to decedents. (Dkt. No. 23, Exs. 2, 3.) However, in response to discovery requests from defendants served in early 2006, plaintiffs stated that they had no documents showing when or where the television was purchased. (See Dkt. No. 23, Exs. 7, 8, 9, 10.) They were also unable to identify the time and date of the purchase. (Id.) Responding to interrogatory requests that asked for all facts supporting the allegation that Simon & Sons sold the television to decedents, plaintiffs averred only that "[u]pon information and belief, the defendant sold and distributed the product to the Simons family." (Dkt. No. 23, Ex. 7, Ans. 13; accord Dkt. No. 23, Exs. 8, 9, 10.) In an affidavit, George Simon, president of Simon & Sons, stated that there were no business records showing the sale of a televison to decedents, and that neither he nor any of the

employees of Simon & Sons recalled selling a televison to the Simons family. (Dkt. No. 1, Ex. D.) Simon & Sons filed for summary judgment in state court on this record. (Id.)

After removal of the case, plaintiffs offered new evidence in the form of affidavits and deposition testimony to support their contention that Simon & Sons had sold the televison that caused the fire. Patricia Bucchanio, the daughter of John and Joan Simons, stated in her affidavit that it was her "understanding" that her parents purchased the Hitachi television at "Simon's Furniture sometime in the 1980's." (Dkt. No. 24, Ex. 2 ¶ 4.) She testified at deposition that, although she was not present during the alleged purchase, she knew this because her "parents always said that they purchased their furniture at Simon & Sons." (Bucchanio Dep. 18:12-20:4, Dec. 21, 2006 (Dkt. No. 24, Ex. 6).)

A son, James P. Simons, stated unequivocally in his affidavit that the television was purchased "from Simon's Furniture sometime in the 1980's." (Dkt. No. 24, Ex. 3 ¶ 4.) At his deposition, he attributed this knowledge to his "parents tend[ency] to buy all their furniture from Simon's Furniture . . . ." and to a "vague[]" conversation he recalled having with his mother in which she said that "they had gotten [the new TV] uptown at Simon's." (J.P. Simons Dep. 20:21-21:13, Dec. 21, 2006 (Dkt. No. 24, Ex. 7).) Another son, William F. Simons, stated in his affidavit that "I know that my parents purchased the Hitachi television . . . from Simon's Furniture sometime in the early 1980's." (Dkt. No. 24, Ex. 4 ¶ 4.) When asked at deposition the basis for this belief, he initially stated that his "parents bought all of their stuff there." (W.F. Simons Dep. 19:24-20:7, Dec. 21, 2006 (Dkt. No. 24, Ex. 8).) Later in the deposition, however, he recalled a

conversation in the "mid '80s" in which his parents told him that they had purchased the televison from Simon & Sons. (Id. at 45:6-47:8.) A third son, John N. Simons, also provided affidavits and deposition testimony stating that his parents told him the television had been purchased at Simon & Sons in the mid '80s. (Dkt. No. 24, Ex. 5 ¶ 5; J. N. Simons, Jr. Dep. 14:24-15:23, Dec. 21, 2006 (Dkt. No. 24, Ex. 9).)

III. Legal Standard

A. Fraudulent Joinder

Fraudulent joinder is an exception to the rule that a federal district court has no jurisdiction under 28 U.S.C. § 1332 when complete diversity of citizenship does not exist between the parties. Removal is appropriate when the non-diverse party has no real connection to the controversy. Carey v. Bd. of Governors of Kernwood Country Club, 337 F. Supp. 2d 339, 341 (D. Mass. 2004); Coughlin v. Nationwide Mut. Ins. Co., 776 F. Supp. 626, 628 (D. Mass. 1991) ("It is well-established, however, that the 'fraudulent joinder' of a resident defendant does not prevent removal."); see also Baella-Silva v. Hulsey, 454 F.3d 5, 10 (1st Cir. 2006) (finding judgment not void where notice of removal asserted non-diverse parties were fraudulently joined and thus "provide[d] an arguable basis for diversity jurisdiction" in lower court's implicit finding that it had jurisdiction to decide case). Fraudulent joinder can be established by showing either: (1) actual fraud in the pleading of the facts; or (2) that there is no possibility that the plaintiff can establish a cause of action against the non-diverse party in state court. Travis v. Irby, 326 F.3d 644, 647 (5th Cir. 2003); see also Polyplastics, Inc. v. Transconex, Inc., 713 F.2d 875, 877 (1st Cir. 1983) ("[A] finding of fraudulent

joinder bears an implicit finding that the plaintiff has failed to state a cause of action against the fraudulently joined defendant."). Here, subsection (2) is the relevant section, as there is no allegation of actual fraud in the pleading under (1), only that there is insufficient evidence to show that the televison set in question was sold by the non-diverse defendant.

The party seeking removal bears the burden of showing, by clear and convincing evidence, that the non-diverse defendant was fraudulently joined. Rodrigues v. Genlyte Thomas Group LLC, 392 F. Supp. 2d 102, 107 (D. Mass. 2005). Therefore, Hitachi has the burden to show that, based on the record before the court, plaintiffs cannot establish a cause of action against Simon & Sons in a Massachusetts court. Plaintiffs assert that the case should be remanded because defendants cannot sustain this burden. (Dkt. No. 3.)

While the First Circuit has not defined a standard for evaluating claims of fraudulent joinder, the Fifth Circuit held that there is no fraudulent joinder when "there is arguably a reasonable basis for predicting that the state law might impose liability on the facts involved." Travis, 326 F.3d at 648 (emphasis in original) (summarizing cases). All disputed questions of fact must be resolved in favor of the plaintiff. Unlike a motion to dismiss, however, a district court may "pierce the pleadings" and consider summary judgment-type evidence in the record in evaluating the plaintiff's possibility of recovery. Id. at 648-49; see also Mills v. Allegiance Healthcare Corp., 178 F. Supp. 2d 1, 5 (D. Mass. 2001) ("In analyzing a claim of fraudulent joinder, a court is not held captive by the allegations in the complaint.").

IV. Discussion

Plaintiffs' case against Simon & Sons depends on establishing that it sold the "color televison (Model CT1900A)" that allegedly was the source of the fire to the decedents.[3] (See Pls.' Second Am. Compl. and Jury Demand ¶¶ 18-20, 23, 28 (Dkt. No. 23, Ex. 3).) At the time the case was removed, there was no evidence to support this allegation. In multiple interrogatory answers prior to removal, plaintiffs averred that the television had been purchased at Simon & Sons, but admitted there were no documents nor any other evidence to support their "understanding and belief" of this fact.

As noted above, after removal, plaintiffs supplemented their initial allegations with new affidavits and deposition testimony, claiming that decedents John and Joan Simons (1) regularly purchased furniture and electronics from Simon's Furniture, and (2) told several of their children that the televison had been purchased at Simon's Furniture. Because the relevant question is whether this evidence provides a reasonable basis for predicting that state law might impose liability, it is necessary to examine Massachusetts law concerning the admissibility of habit and hearsay evidence.

1. Admissibility of Habit Evidence

Unlike Rule 406 of the Federal Rules of Evidence, Massachusetts does not

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[3] In the memorandum supporting their motion to remand, plaintiffs now allege that a "Hitachi television (CT1900 series)" caused the fire, apparently because there is no evidence that Simon & Sons ever sold the Model CT1900A, but there is evidence that it sold a different model Hitachi television to the brother of John Simons. (See Dkt. No. 24, 4 (emphasis added).)

allow evidence of a person's habits to be admitted to show an act was performed in accordance with that habit. Figueiredo v. Hamill, 385 Mass. 1003, 1004 (1982) (citing to cases from 1893 onwards); see also Palinkas v. Bennett, 416 Mass. 273, 276 (1993) (citing a number of examples of inadmissible habit evidence, including "evidence of frequent drunkenness; of being a careful driver; of being a careful and prudent person; of frequently engaging in fights; and of intemperance.") (internal citations omitted). Given this long history of deeming habit evidence inadmissible "[f]or the purpose of proving that one has or has not done a particular act," there is little question that Massachusetts courts would not admit evidence that the decedents regularly purchased items from Simon & Sons for the purpose of proving it the source of the television in question. See Commonwealth v. Nagle, 157 Mass. 554, 555 (1893).[4]

2. Admissibility of Statements of Deceased Declarants

Under both Massachusetts law and the Federal Rules of Evidence, hearsay testimony is generally not admissible. See Fed. R. Evid. 802; 20 Mass. Prac., Evidence § 802.1 (2d ed.). Massachusetts, however, provides an exception by statute to the inadmissibility of hearsay evidence where the declarant is deceased:

In any action or other civil judicial proceeding, a declaration of a

[4] Plaintiffs' sole state case cited in support of admissibility of this evidence actually addresses "[t]he admissibility of evidence of injury to others at other times by reason of the same thing that caused the plaintiff's injury, for the purpose of showing that thing to be dangerous," not habit evidence. Robitaille v. Netoco Community Theatres of North Attleboro, Inc., 305 Mass. 265, 266 (1940). Even in that case, the SJC noted that "[s]uch evidence is open to grave objections" and is usually excluded "in a wise exercise of discretion," but held that such evidence was not inadmissible by rule of law. Id. There appears to be no similar discretion available to Massachusetts trial judges to admit evidence of personal habit to prove a particular act.

> deceased person shall not be inadmissible in evidence as hearsay or as private conversation between husband and wife, as the case may be, if the court finds that it was made in good faith and upon the personal knowledge of the declarant.

Mass. Gen. Laws ch. 233, § 65 (2000).

This statute has been liberally construed by Massachusetts courts to extend the intended relief. See, e.g., In re Keenan, 287 Mass. 577, 581 (1934); Samuel Cohen Shoe Co. v. Cohen, 329 Mass. 281, 284 (1952); Bellamy v. Bellamy, 342 Mass. 534, 536 (1961); Young v. Slaney, 255 F.2d 785, 787 (1st Cir. 1958). As a preliminary matter, the trial judge must make a determination that the declaration was made in good faith and on personal knowledge, as required by the statute. Old Colony Trust Co. v. Shaw, 348 Mass. 212, 216 (1964). If these conditions are met, the evidence is not inadmissible, although it may be objected to on other grounds. Id.

Here, several children of John and Joan Simons have submitted affidavits and provided deposition testimony that they now remember that their parents told them the television in question came from Simon's Furniture. In conversation with their children, decedents allegedly described the purchase of a television set, shortly after that purchase. Because the decedents' alleged statements were made before they could know the television was a fire hazard, they meet the preliminary requirements that they be made in good faith and on personal knowledge.

While this belated testimony is suspect, vague and in the deponents' self-interest, it is admissible in Massachusetts against a hearsay objection. Viewing this testimony in favor of plaintiffs, they have offered admissible evidence that, if believed,

would show that the television was purchased from Simon & Sons. Therefore, it is not possible to say that there is no basis for recovery against the non-diverse defendant under Massachusetts law.

V. Conclusion

Because the testimony of a deceased declarant is not inadmissable in Massachusetts courts, there is a possibility that plaintiffs could establish a cause of action against Simon & Sons. Therefore, complete diversity does not exist and this court does not have subject matter jurisdiction over the case.

Accordingly, plaintiffs' motion to remand (Dkt. No. 3) is ALLOWED.

May 3, 2007
DATE

/s/Rya W. Zobel
RYA W. ZOBEL
UNITED STATES DISTRICT JUDGE